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Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLES F. WILLIS, JR.,

Petitioner,

vs.

THE CLEVELAND TRUST COMPANY
n/k/a Ameritrust Company
Executor of the Estate of
Harvey S. Firestone, Jr., Deceased

ELIZABETH FIRESTONE WILLIS Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED

Whether Article IV, Section 1 of the Constitution of the United States (Full Faith and Credit) is violated by an Ohio judgment based upon facts deemed admitted because of Petitioner's tardy denial, which "admitted facts" are directly contrary to the facts found by a Court of competent jurisdiction in the District of Columbia, which finding is binding through privity upon the party requesting the admissions in the Ohio proceeding.

PARTIES BELOW

All parties to the proceeding below are listed in the caption of this petition.

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio, The Cleveland Trust Co. v. Willis, is reported in 20 Ohio St. 3d 66, __ N.E. 2d __ (1985). The opinion of the United States Court of Appeals for the District of Columbia Circuit, Willis v. Willis, is reported at 655 F.3d. 1333, 211 U.S. App. D.C. 103, (1981). The opinion of the United States District Court for the District of Columbia, Willis v. Willis, is reported in 30 U.C.C. Rep. Serv. 1332 (1980).

The opinion of the Summit County Ohio Courts of Appeals and Common Pleas, not reported, appear in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio, affirming the decision of the Court of Appeals for Summit County, was entered on November 27, 1985. Petitioner's motion for

rehearing was denied on January 15, 1986. This petition for a Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

ARTICLE IV.

> Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

STATEMENT OF THE CASE

Introduction

This litigation involves two contradictory judgments in the District of Columbia and Ohio involving the signatory status of Petitioner and respondent's decedent, Harvey S. Firestone, Jr. ("Mr. Firestone"), on a promissory note to the Firestone Bank of Akron ("Firestone Bank") and their respective rights to the ownership of common stock which had been deposited as collateral. Mr. Firestone was the father of Petitioner's former wife, Elizabeth Firestone Willis ("Elizabeth"). Mr. Firestone contracted to sign the note in place of his daughter.

The first action was brought by Petitioner in the United States District Court for the District of Columbia against

Elizabeth and respondent Executor. Willis v. Willis, 30 U.C.C. Rep. Serv. 1332 (1980). The District Court held that Elizabeth was not personally obligated on the note but that her father was a co-maker, and that neither were accommodation makers. The United States Court of Appeals for the District of Columbia Circuit in affirming the judgment for Elizabeth, held that her father was in fact a co-maker, but reversed the judgment against respondent Executor for lack of personal jurisdiction. Willis v. Willis, 655 F.2d 1333 (1981).

The second action was brought by respondent Executor in the Summit County Ohio Common Pleas Court against The Firestone Bank, Petitioner, and Elizabeth. Because Petitioner was tardy in filing objections to the executor's Request for Admissions, the Trial Court held that Mr.

Firestone's status as accommodation party was conclusively established by admission, contrary to the District of Columbia appellate decision, and entered judgment accordingly. This holding was affirmed by the Court of Appeals and the Supreme Court of Ohio, The Cleveland Trust Co. v. Willis, 20 Ohio St. 3d 66 (1985).

We will briefly summarize the facts and the course of the proceedings in each case and Court.

SUMMARY OF FACTS

Beginning in 1958, Petitioner and his then wife, Elizabeth Firestone Willis, borrowed money from New York banks to finance the purchase of shares in Alaska Airlines, of which Petitioner was to become president and chief executive officer. The

Alaska Airlines stock was registered in the names of Petitioner and Elizabeth as joint tenants and served as collateral for the loan. Elizabeth's shares in The Firestone Tire & Rubber Company were also deposited as collateral.

In 1964, the New York loan and the collateral were transferred to The Firestone Bank of Akron, Ohio. The loans were renewed so that by 1968 both Petitioner and Elizabeth were jointly and severally liable as co-makers in the amount of $441.339.00.

In 1969, The Firestone Bank mailed Petitioner a renewal note. At that time, Petitioner and Elizabeth had separated. Petitioner was living in Seattle, Washington, Elizabeth in the District of Columbia. Petitioner, after signing the note, mailed it to his wife's divorce counsel in the District of Columbia asking that Elizabeth sign the note and return it

to him for transmittal to the Bank. Elizabeth, without telling Petitioner, refused to co-sign the note. Instead, her counsel mailed the unsigned note to her father, Harvey Firestone in Akron, Ohio. Later Elizabeth and Mr. Firestone entered into a secret agreement by which Mr. Firestone was to sign the renewal note in Elizabeth's place, and Elizabeth was to leave her Firestone Tire & Rubber Company stock as collateral and give her father an option to purchase all her interest in Alaska Airline stock. Mr. Firestone "whited out" or erased Elizabeth's name as intended co-maker on the note and signed in her place. The Bank accepted this note without telling Charles, who did not learn about the substitution of parties until 1978.

Petitioner and Elizabeth were divorced in 1970. Mr. Firestone died in

1973 and respondent was appointed Executor of his estate.

After Mr. Firestone's death, The Firestone Bank presented a claim to respondent Executor demanding that Mr. Firestone's estate pay the note in its entirety. No demand was made by the Bank on either Petitioner or Elizabeth. After litigation in the Ohio Probate Court, the respondent paid the note.

The District of Columbia Litigation

In 1976, Petitioner brought an action for a declaratory judgment against Elizabeth in the United States District Court for the District of Columbia, asking that Court to declare the parties' respective obligations on the 1969 renewal note and their entitlement to the stock securing it. (Civil Action No. 76-1225,

United States District Court for the District of Columbia). In 1978, after he had been made a party to Summit County Probate Court proceedings to enforce payment of the note and learned for the first time that Mr. Firestone had signed the renewal note in place of Elizabeth, he added respondent Executor and The Firestone Bank as additional parties defendant in the District of Columbia litigation. The Firestone Bank was dismissed by the U.S. District Court for want of personal jurisdiction.

Petitioner claimed that he was not liable on the 1969 note because he had not consented to--indeed had no knowledge of--the substitution of makers. He argued that he had agreed to sign with his wife, not his father-in-law; hence, he was not obligated on the renewal note and was entitled to a return of his Alaska Airlines

stock. Both Elizabeth and respondent Executor contended that Elizabeth was an accommodation maker for Charles on pre-1969 notes and that Mr. Firestone was an accommodation maker on the 1969 note because he had signed in his daughter's place and thereby assumed her previous status.

The District Court held that Elizabeth was a co-maker and not an accommodation party on the pre-1969 notes, and that "with regard to the 1969 note, Elizabeth was never a party to that note" in any capacity. (Appendix p. 115). Nevertheless, it awarded contribution to Elizabeth for interest she had paid on the note, based on the intent of Petitioner that she be a co-party. (Appendix p. 97). The District Court rejected respondent Executor's claims for contribution or indemnification, finding that Harvey Firestone was not an accommodation maker but

a co-maker who had completed the instrument contrary to the authority given, and was thus "a mere interloper and he may acquire no rights against Charles after the Bank has called upon him to honor the obligation for which he volunteered." (Appendix p. 94).

On appeal, the United States Court of Appeals for the District of Columbia Circuit held that the District Court had no jurisdiction over respondent Executor under the District's long-arm statute because its decedent, Harvey Firestone had not transacted sufficient business in the District. Therefore, as to respondent Executor, the decision was reversed. The Court of Appeals, however, affirmed the District Court's holding that Elizabeth was not personally bound on the 1969 note in any capacity, and the Petitioner and Harvey Firestone "alone were the 'co-makers' of the 1969 note". The Court found that by paying

interest to protect her collateral, Elizabeth became subrogated to Harvey Firestone's right, in his capacity as co-maker, to contribution from Petitioner. (Appendix p. 83).

The Ohio Litigation

While the District of Columbia litigation between the same parties was pending in the U.S. District Court for the District of Columbia, respondent Executor brought suit against The Firestone Bank, Petitioner, and Elizabeth in the Court of Common Pleas of Summit County, Ohio on March 26, 1979 asking for possession of the collateral and a money judgment against Charles to indemnify it for the note which it had been required to pay through the Summit County Probate Court proceedings.

The Ohio litigation was suspended to allow the District of Columbia litigation to proceed. In 1981, after the U.S. Court of Appeals for the District of Columbia held that the District of Columbia Courts had no personal jurisdiction over the respondent Executor, the Ohio litigation resumed.

In May, 1983, six weeks before the scheduled trial date, respondent's Ohio counsel, pursuant to Rule 36 of the Ohio Rules of Civil Procedure, served some 50 requests for admissions on Petitioner's counsel. At that time, Charles was residing in Honolulu, Hawaii and was in ill health. Two of these requests (Nos. 28 and 32) requested admissions on points of law and fact that had been decided to the contrary by the United States District Court for the District of Columbia in the prior action between these same parties, and affirmed by

the U.S. Court of Appeals for the District of Columbia Circuit:

> "Request No. 28:
>
> Elizabeth Firestone Willis was an accommodation party on the series of notes to The Firestone Bank of Akron executed by her and Charles F. Willis, Jr. between November, 1964 and September 30, 1968.
>
> Request No. 32:
>
> Harvey S. Firestone, Jr. signed the October, 1969 renewal note as an accommodation party."

Petitioner's response to these requests for admission denying the truth to these statements was filed 11 days too late. At the onset of the trial, the trial judge struck Petitioner's responses and deemed all of the requested admissions to be true including No. 28 and 32 quoted above. To avoid a default, Petitioner moved to amend his untimely answers to permit late filing, attaching medical data to excuse his delay. This motion was denied.

Relying exclusively upon the statements that Elizabeth and Mr. Firestone were accommodation makers for Charles, which were deemed admitted solely because of the tardy denials, and which were offered in evidence over Petitioner's res judicata objections, the Trial Court refused to give effect to the prior contrary finding of the District of Columbia Courts or to take additional evidence on the status of the parties. It entered judgment against Petitioner in favor of respondent Executor and ordered that all of Petitioner's Alaska Airlines stock held as collateral by The Firestone Bank be sold to satisfy the judgment. (Appendix p. 47,48).

TREATMENT OF THE QUESTION IN THE COURTS BELOW

Court of Common Pleas

The issue of Full Faith and Credit and res judicata of the District of Columbia judgment was raised by Petitioner immediately after the trial Court struck Petitioner's responses and ordered respondent's statements of fact deemed admitted.

Copies of the decisions of the District of Columbia Courts had been offered to the trial Court in connection with cross-motions for summary judgments previously filed by Petitioner and respondent, which had been denied by the trial Court.

At the trial, Petitioner's first opportunity to raise the res judicata

argument with respect to the requests for admissions was by objecting to their being offered into evidence. Petitioner's counsel and Elizabeth's counsel both argued that the status of Elizabeth had been conclusively determined by the District of Columbia Courts. (Appendix p. 120 et seq.)

The Court of Common Pleas issued its Findings of Fact, Conclusions of Law and Judgment, finding that Harvey Firestone "as admitted was an accommodation maker to him" (Petitioner). The Court relied upon Harvey Firestone's status as accommodation party and granted judgment against Petitioner for the full amount of the payments the Executor had made, plus interest, not the one-half it would have been entitled to receive as co-maker. The total judgment was $858,958.13.

Respondent's counsel admitted the

applicability of res judicata and full faith and credit.

> "MR. KERPER: Your Honor, our position is, of course, that everything he says maybe would have been proper if they had timely--they had a right to timely respond, and they didn't do it; and once that happens, the rule says any matter admitted under this rule is conclusively established."

Court of Appeals for Summit County

The judgment of the Court of Common Pleas was appealed to the Court of Appeals for Summit County. In his Brief and Assignments of Errors, Petitioner raised the issue at page 30:

> "Moreover, Elizabeth herself was not an accommodation party for Charles; she was a co-maker. Judge Richey specifically decided (Opinion, Findings of Fact and Conclusions of Law, pp. 17-21; App. 70-74) that Elizabeth as a co-maker with Charles received a pecuniary benefit in the form of

> the purchase of Alaska Airlines stock. Judge Richey also found that Mr. Firestone, who substituted himself for his daughter, stood in no better position than Elizabeth whom he replaced. Furthermore, the Court of Appeals for the District of Columbia implicitly found that Elizabeth, before 1969, had been a co-maker with Charles. Therefore it has already been adjudicated in a judgment binding upon both Charles and Elizabeth that Elizabeth was a co-maker and not an accommodation maker on all of the notes at The Firestone Bank. (See Elizabeth's answer to Plaintiff's request for Admission No. 28.) Because Elizabeth was not an accommodation party (maker), Mr. Firestone cannot be an accommodation party."

Respondent in its answer brief in the Ohio Court of Appeals argued (Brief for Plaintiff-Appellee, The Cleveland Trust Company, pp. 14-15):

> "Mr. Willis failed to present any evidence to the Trial Court, either in connection with his attempt to amend his admissions or at the trial on the merits, that indicated that Mrs. Willis and Mr. Firestone were not, in fact, accommodation parties on those notes.

> Mr. Firestone's status as an accommodation party on the 1969 note was dependent upon Mrs. Willis's status as an accommodation party on earlier notes to The Firestone Bank in the same series."

Thus, respondent conceded for the first time that it claimed accommodation status for Mr. Firestone through Elizabeth, that is, that Mr. Firestone could not stand on his own feet. Petitioner, therefore, again raised the issue of res judicata in its reply brief (Reply Brief, of Defendant-Appellee, Charles F. Willis, Jr., pp. 10-11):

> Moreover, as conceded by the Executor in its brief (p. 15), Mr. Firestone's claims arise through his agreement with Elizabeth "to assume the liability of Willis on the 1969 renewal note" (Stock Option Agreement). Thus, plaintiff-appellee admits that Mr. Firestone's status depends upon Elizabeth's status. Elizabeth has been adjudicated to have been a co-maker, not an accommodation maker; therefore, Mr. Firestone cannot be an accommodation maker, because he claims to stand in her

> shoes. (Citing Trautwein v. Songenfrei, 58 Ohio St. 2d 493 (1979). According to Trautwein, plaintiff-appellee, is estopped from relitigating the issue of her status in the Summit County Common Pleas Court. Even though the District of Columbia had no jurisdiction over the Executor, it clearly had jurisdiction over Elizabeth. Therefore, because Elizabeth has been conclusively determined to be a co-maker, that issue cannot be relitigated. Under Civil Rule 36, requests for admissions could never have been intended to be used for the purpose of impeaching binding and conclusive judgments which have decided issues of law, or fact and law, by which the requesting party or a party in privity with him is bound."

The Court of Appeals upheld the lower Court decision rejecting the proffered denials of the requested admissions (Appendix p. 20-25) but did not address the question of Full Faith and Credit or res judicata.

Supreme Court of Ohio

In his Memorandum in Support of Claimed Jurisdiction in the Ohio Supreme Court, Petitioner argued (Proposition of Law No. 1) that the admissions violated res judicata and Full Faith and Credit:

> "When a party, or a party in privity, to final judgment of another state, has offered into evidence, over objection, Civil Rule 36 admissions of law and fact that are contrary to the judgment, the admissions under res judicata and full faith and credit (Constitution of the United States, Article IV, Section 1) cannot be used to collaterally attack the binding judgment."

Petitioner carried his res judicata and Full Faith and Credit argument into his brief on the merits (Brief of Defendant-Appellant, Charles F. Willis, Jr., p. 11):

> "Request No. 28 precluded Charles from showing that Elizabeth was not an accommodation party on the notes executed prior to 1969. That issue had been conclusively determined in the federal proceedings, and was entitled to full faith and credit under the United States Constitution, and the Supremacy Clause of that Constitution. Yet, the major premise and issues litigated by The Cleveland Trust Co. was based on the proposition that Elizabeth was an accommodation party on the pre-1969 notes, and that Harvey, being in privity and standing in her shoes, derived through her the status of an accommodation party on the 1969 note."

Respondent argued in its answer brief that privity did not apply, and Petitioner reasserted Full Faith and Credit in his reply brief.

The Supreme Court of Ohio in The Cleveland Trust Co. v. Willis, 20 Ohio St. 3d 66 (1985) held that Charles' dilatory response to respondent's requests for admissions resulted in a conclusive

admission that both Elizabeth and Mr. Firestone were accommodation makers for Petitioner. The Supreme Court of Ohio did not discuss Petitioner's Full Faith and Credit argument nor did it mention the District of Columbia judgments. In its motion for rehearing, Petitioner again reasserted his contentions that modern discovery techniques should not be used to circumvent Full Faith and Credit:

> "Request number 28, that Elizabeth Willis was an accommodation party on the series of pre-1969 notes was impossible. Mrs. Willis had been determined by a judgment in the District of Columbia to have been a co-maker. This decision was res judicata. Request number 32, that Mr. Firestone had signed the 1969 note as an accommodation party, was likewise impossible because Mr. Firestone had contracted to sign in Elizabeth's place and stood in her shoes. Charles had no reason to believe that these two requests for admissions could possibly be used against him because they violated res judicata.

> Modern discovery techniques should not be used to circumvent Full Faith and Credit."

The Supreme Court of Ohio denied rehearing without Comment (Appendix p. 14).

REASONS FOR GRANTING THE WRIT

Under Full Faith and Credit (Article IV, Section 1), the doctrine of res judicata becomes a part of Federal constitutional law.

> "This Court has consistently recognized that, in order to fulfill this constitutional mandate, 'the judgment of a state court should have the same credit, validity and effect, in every other Court of the United States, which it had in the state where it was pronounced' Hampton v. McConnel, 3 Wheat 234, 235, 4 L. Ed. 378(1818) (Marshall, C.J.); Riley v. New York Trust Co., (315 U.S. 343) at 353, 86 L. Ed. 885, 62 S. Ct. 608."
>
> Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association, et al, 455 U.S. 691, 71 L. Ed. 2d 558, 102 S. Ct. 1357 (1982).

See also, Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149 (1943)

A judgment of a Court of competent jurisdiction in the District of Columbia is entitled to the same res judicata effect in Ohio as it has in the District of Columbia. The application of that doctrine in the District of Columbia was best expressed by the United States Court of Appeals for the District of Columbia Circuit in Jefferson School of Social Science v. Subversive Activities Control Board, 331 F.2d 76, 118 U.S. App. D.C. 2 (1963):

> "(The doctrine of res judicata) is a rule of judicial administration the purpose of which "is to secure the peace and repose of society by the settlement of matters capable of judicial determination" as described at length by the Supreme Court in the County of Sac case (Cromwell v. County of Sac, 94 U.S. 351, 52-53, 24 L.Ed. 195 (1876)), the doctrine has two rules of application: A judgment upon the merits constitutes an

> absolute bar to a subsequent action upon the same claim between the same parties or those in privity with them; and, if a second action between the same parties (or those in privity with them) is upon a different claim, the prior judgment operates as an estoppel as to those matters in issue upon the determination of which the prior finding was rendered. In any event the doctrine applies not only to the actual parties to the first litigation but also to those persons in privity with them. The term "privity" is an elusive concept, without any precise definition of general applicability. It is not necessary for us to explore all its subtleties here. It is sufficient that the word designates a person so identified in interest with a party to the former litigation that he represents precisely the same legal right in respect to the subject matter involved."

See also, Blonder-Tongue v. University Foundation, 402 U.S. 313, 321 (1971)

Applying these standards to the present litigation it is clear that Harvey Firestone (and his representative, the

respondent Executor) were "in privity" with daughter Elizabeth. After a full trial in which Petitioner, Elizabeth and Harvey's Executor participated most actively, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit found that Elizabeth was not a party to the 1969 note, but that Harvey Firestone was a co-maker. The Court of Appeals further found that Elizabeth, by paying the interest on the note, became subrogated to Harvey's right as a co-maker to seek contribution from Petitioner Charles Willis. There could not be a clearer identity of interest.

While the District of Columbia Courts resolved the dispute between Charles and Elizabeth, the Court of Appeals found itself without the requisite personal

jurisdiction to adjudicate the rights of Charles Willis and Harvey Firestone's Executor arising out of the same transaction. That contest was shifted to the State Courts of Ohio, with the same contestants. In the Ohio Courts Harvey's Executors acknowledged that under the contract by which he agreed to take his daughter's place on the 1969 renewal note Harvey's status on the 1969 note was the same as Elizabeth's status on the 1968 and prior year's notes--that Harvey's status was dependent upon Elizabeth's status. Again the "privity" was clear and conceded. Under Ohio law, as well as District of Columbia law, the Executor was in "privity" with Elizabeth and bound by res judicata. Trautwein v. Songenfrei, 58 Ohio St. 2d 493.

Although being fully conversant with the District of Columbia judgments, the

respondent Executor served requests for admission in Ohio asking Petitioner to admit facts directly contrary to those which the District of Columbia Courts had determined. Because of illness and distance, Petitioner was late in filing his denials. The Ohio Trial Court refused to permit late filing of Petitioner's response, declared those "facts", directly contrary to the findings of fact contained in the District of Columbia judgments, to be admitted, i.e. conceded, for all purposes, and proceeded to enter judgment on the basis of those "facts".

This could never have happened in the District of Columbia. Would any trial judge there completely disregard the finding of his appellate superiors and find the facts opposite to their mandate, in a case arising out of the same factual situation

between parties clearly in privity? To ask the question begs the answer.

The U. S. Court of Appeals for the District of Columbia had finally determined the status of all the parties on the note. The only open question was the respective rights of Petitioner and respondent Executor to contribution or to release, and the disposition of the collateral, under the unique circumstances of this case. That portion of the District of Columbia judgment had been vacated for lack of personal jurisdiction over Harvey's Executor. The rest was res judicata.

Under the Full Faith and Credit Clause the Court of Common Pleas of Summit County, Ohio was required to give the same effect to the District of Columbia judgment as would a District of Columbia Court. A judgment is a judgment, and cannot be

altered, amended or diluted by an apparent "admission" to the contrary by a litigant in a subsequent proceeding. That litigant cannot vacate or rescind the judgment. Only the Court which issued it, or a Court superior to it, may do that, and as long as has not been vacated, rescinded or amended, it must be honored.

This is an important principal of Federal law which should be clarified by this Court. The entitlement of a judgment of a Court of competent jurisdiction to Full Faith and Credit by the Court of a sister state should not be defeated by an unwary answer to discovery questions, or a tardy response to requests for admissions. The Trial Court should not thereupon be entitled to disregard the prior judgment, act as if it had never been entered, and take contrary facts as conceded for purposes of the

subsequent proceeding. This is a principle which has never been clearly elucidated by this Court, and deserves to be announced.

Respectfully submitted,

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